

***United States Court of Appeals
for the Second Circuit***



**APPELLANT'S
BRIEF**

ORIGINAL
74-1344

United States Court of Appeals
FOR THE SECOND CIRCUIT

JOAQUIM CONCEICAO,
Plaintiff-Appellee,
against

NEW JERSEY EXPORT MARINE CARPENTERS, INC.,
Defendant and Third-Party Plaintiff-Appellee,
and

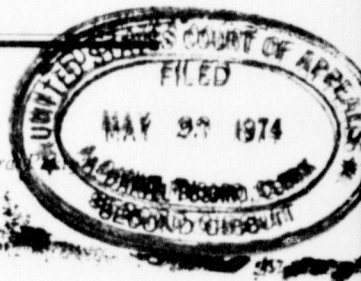
CIA DE NAV. MAR. NETUMAR,
Defendant and Third-Party Plaintiff-Appellant,
against

INTERNATIONAL TERMINAL OPERATING CO., INC.,
Third-Party Defendant-Appellee

ON APPEAL FROM THE UNITED STATES DISTRICT COURT,
FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF OF DEFENDANT AND THIRD-PARTY
PLAINTIFF-APPELLANT

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BRIEF OF DEFENDANT AND THIRD-PARTY PLAINTIFF-APPELLANT

Questions Presented

1. Can a jury finding be sustained by an inference drawn from facts, which if they existed, would not constitute liability under any accepted concept of the law?
2. Was the jury's finding that the defendant Netumar was negligent consistent with its finding that the defendant's vessel was not unseaworthy?
3. Was the trial court in error in refusing to charge the jury that the shipowner had no duty to supervise an independent contractor to whom work is delegated either as to the instrumentalities adopted and methods used, and is not liable for the negligence of the long-shoremen unless such negligence created an unseaworthy condition?
4. Was the trial court in error in refusing to charge the jury that the shipowner is not precluded from recovering indemnity unless by its conduct it actively hindered or prevented the stevedore from performing its services in a workmanlike manner?
5. Was the trial court in error in holding that the exercise of overall control by a shipowner over the loading operations of a stevedore and the duty to furnish the plaintiff a reasonably safe place to work standing alone is sufficient to preclude indemnity?

Statement

The plaintiff, a longshoreman, sustained an injury to his left foot on November 5, 1970, when it became caught between some pipe which he and other longshoremen in the employ of International Terminal Operating Co., Inc. were loading and stowing in a pipe bed which had been constructed on the weather deck of the SS MOSQUEIRO by marine carpenters in the employ of New Jersey Export Marine Carpenters, Inc. (New Jersey Export).

The SS MOSQUEIRO, which at the time was berthed at Pier 36, East River, New York City, was owned by Cia De Nav. Mar. Netumar (Netumar). The plaintiff was employed by third-party defendant International Terminal Operating Co., Inc. (I.T.O.) and he together with other longshoremen in the employ of I.T.O. were engaged in loading cargo aboard the SS MOSQUEIRO.

The plaintiff sued both New Jersey Export and Netumar. He alleged that New Jersey Export was negligent and had breached its warranty to construct a pipe bed which would not fail in normal use. Netumar was also alleged to have been negligent and the SS MOSQUEIRO unseaworthy because the pipe bed was not fit for its intended use.

Both New Jersey Export and Netumar impleaded I.T.O. alleging that I.T.O. breached its warranty to perform the loading operation in a safe and workmanlike manner.

After trial before the Hon. Robert J. Ward and a jury on October 29, 30, November 1, 2 and 5, the case was submitted to the jury on written questions. New Jersey Export was found free of negligence and not to have breached its warranty to construct a proper and adequate pipe bed. Netumar was held to have been negligent but the SS MOSQUEIRO was found to be seaworthy. The plaintiff was found free of contributory negligence but I.T.O. was found to have breached its warranty of workmanlike serv-

ice. Netumar however was denied indemnity because the jury found that its conduct precluded indemnity. Damages in the sum of \$42,000.00 were awarded the plaintiff and judgment in accordance with the jury's answers to the questions was entered against Netumar (462a-465a).

Within ten days from the date the jury returned its verdict, Netumar moved for judgment notwithstanding the verdict or for a new trial. Judge Ward denied the motion on the grounds that there was sufficient probative evidence to support a finding that Netumar's participation in the construction of the pipe bed was negligent even though it resulted in the construction of a pipe bed which was reasonably fit for its intended purpose. It further held that Netumar's exercise of overall control over the construction of the pipe bed and the loading of the vessel was sufficient to preclude indemnity and sustain a finding that the plaintiff was not furnished with a safe place to work, even though the vessel itself was seaworthy and the functions of constructing the pipe bed and conducting the loading operation had been delegated to New Jersey Export and I.T.O. respectively (457a-460a).

Netumar then filed a notice of appeal (467a-468a). The plaintiff has also filed a notice of protective cross appeal from the judgment for Netumar that the SS MOSQUEIRO was seaworthy and from the judgment in favor of New Jersey Export on the causes of action against it for negligence and breach of warranty (469a).

The Facts

On November 5, 1970 the plaintiff and other longshoremen boarded the SS MOSQUEIRO at approximately 8:00 A.M. and commenced loading 30-foot lengths of steel pipe which were 18 inches in diameter and weighed about 1,800 pounds (27a) into a structure, called a pipe bed, which had been

constructed on the main deck of the SS MOSQUEIRO on the starboard side of the No. 1 hatch (29a).

The pipe bed had been constructed by marine carpenters in the employ of New Jersey Export under the supervision of its general manager and head foreman, William Montella (201a). It consisted basically of two rows of uprights, running fore and aft parallel to each other. They were nailed to bottom timbers running athwartship and secured by whalers and bracing. The uprights were at five-foot intervals. One row of uprights was against the coaming of No. 1 hatch, while the other was alongside the ship's rail creating an alley-way which was open at each end (203a-204a).

At the time the longshoremen boarded the SS MOSQUEIRO on November 5, 1970, the construction of the pipe bed was complete (41a, 98a, 125a). Ratliff, the plaintiff's hatch boss, testified that normally he would board the vessel and make an inspection to determine whether everything was proper before work commenced (85a). On November 5, 1970 he did not come aboard until 8:20 or 8:30 A.M. because he had to see what cargo they were to load aboard the vessel (84a). In this instance he however did have someone, whom he could not identify, stand in for him and make sure that everything was taken care of (85a).

Brooks, one of the longshoremen working with the plaintiff, testified that when they started stowing pipe into the pipe bed they looked to see that the uprights were the same distance apart from each other to make sure that each tier fitted exactly, and found that the pipe fitted snugly (147a-148a).

The plaintiff, the hatch boss Ratliff, Brooks and Head, another longshoreman, who was also working on the loading of the pipe into the pipe bed in question, were in complete agreement that from the time they commenced work at 8:00 A.M. until approximately 10:00 A.M. when the

plaintiff's accident occurred, drafts consisting of two pipes were picked up by the ship's loading gear from a lighter which was berthed outboard of the SS MOSQUEIRO (28a), raised aboard the vessel, and lowered and landed gently onto the pipe already stowed in the pipe bed (45a, 70a). They were also in complete agreement that the loading operation proceeded without any difficulty and that at no time did any of the pipe come into contact with any of the uprights of the pipe bed (64a, 71a, 80a, 106a). They all also testified that at no time did they observe any damage to any part of the pipe bed (36a, 96a).

The pipe was attached to the vessel's cargo runners by means of a sling which was equipped with two hooks which were affixed to the respective ends of the sling and were hooked onto the ends of the pipe (29a).

According to the plaintiff, when his accident occurred he was standing with his left foot resting on a pipe, which had been previously loaded into the bed, and was reaching across the pipe in order to disengage a hook from the forward end of one of the two pipes which had just been landed (31a). It was his contention that some of the pipe at the forward end of the pipe bed shifted pinning his left foot under or between the pipe (31a).

While the plaintiff did state in the course of his testimony that when his accident occurred, the uprights broke and the pipes moved (31a), he admitted that he did not really know what happened (68a). Ratliff, Head and Brooks however testified that one or more uprights broke (77a-78a, 104a-105a, 121a, 140a-141a).

The plaintiff, his hatch boss Ratliff, Brooks and Head were in complete agreement however that when the accident happened the pipe in the bed was below the height of the uprights (52a, 108a-109a, 119a, 136a, 143a-144a).

There was no testimony that any of the ship's officers, or anyone for whom the shipowner would be responsible,

directed, interfered with, or in any way was involved in the loading operation. The hatch boss Ratliff testified that it was his function to see that the cargo was put on the ship in the proper place where he was told by the stevedore (81a), and that for one hour or more before the accident he directed the longshoremen how to lay the pipe in the bed (90a). While the Port Captain for Netumar did testify that he, in conjunction with the Master and Chief Officer of the SS MOSQUEIRO drew up and approved the proposed stowage, it was subject to the approval of the stevedore (173a). According to Captain Wheeler, the stevedore's expert (333a-335a), the ship's officers supervision is concerned with shipboard stability and contamination of one cargo with the other (388a-389a). The stevedore, on the other hand, is responsible for the manner of bringing it aboard and the manner in which it is loaded (389a-390a).

Montella, New Jersey Export's General Manager and Foreman, who was not a witness to the accident (204a) and was unable to recall where he was when he learned of the accident, except that he was somewhere on the ship, was permitted to express an opinion over objection (220a) that the reason the upright broke or gave way was because it had been damaged by the longshoremen when a draft, as it was being loaded into the pipe bed, was permitted to swing and strike the upright (220a-221a). According to Montella, he reached this conclusion because the damaged upright was part of the pipe bed (218a-219a) and there were round markings on it (220a-221a, 245a). The last time Montella was at the No. 1 hatch prior to the accident was at 8:15 A.M. when he spent about 15 minutes looking over the job they had done the day before (233a). There was no testimony as to when the upright sustained these markings, nor their visibility to a reasonable inspection, or that they were not on the lumber when it was furnished by New Jersey Export or had not been caused by New Jersey Export in the course of transporting it and bringing it aboard or while it was being installed.

Montella further testified that when he arrived on the scene of the accident after the plaintiff's foot had been freed (205a), the pipe was in place in the bed (230a), and on inspecting the No. 1 upright on the forward offshore side he noticed that it was cracked (205a-206a). This had caused the pipe to shake and come down a little deeper (249a). The upright was repaired by nailing another timber against it (207a). Nothing else was done to the bed (207a) and none of the pipe had to be moved (222a, 252a). Later that day the marine carpenters lashed the pipe in the bed and constructed a catwalk over the pipe (250a).

The only testimony with respect to Netumar's involvement in this case came from Richard Piper, its Port Captain, and William Montella, New Jersey Export's General Manager and Foreman. Except for an outline of Mr. Piper's duties as Port Captain and the fact that Netumar as the vessel owner exercised overall supervision to insure that the work was completed in accordance with the contract, the testimony was restricted to the nature and extent of Netumar's participation in the design, construction and inspection of the pipe bed.

Piper, Netumar's Port Captain testified that he ordered the pipe bed to be constructed by issuing an oral work order to Montella. According to Piper, the work order consisted basically of telling Montella that he had a certain number of pipe which because of its size had to go on deck and that he wanted a sufficient bedding made to carry the pipe safely (182a-183a). The construction and number of beds to be constructed was left to Montella (184a-185a).

In the portion of the deposition of New Jersey Export which was read as part of the plaintiff's case, Montella agreed that Netumar's Port Captain transmitted work orders to him orally (165a). While he disagreed that the Port Captain left the number of beds to be constructed to him, he was in agreement that the Port Captain only asked him to build the pipe beds and did not tell him how to build

the pipe beds (235a-236a) or what to build them with (239a-240a). Montella also testified that he did not have to have the weight of the pipe or know its size, diameter or length in order to build a pipe bed (254a-255a).

POINT I

The trial court's determination that there was probative evidence to support the jury's finding that defendant Netumar was negligent is based on inferences which are not supported by the evidence and cannot be sustained as a matter of law.

There is a complete absence of probative evidence to support the jury's finding that the defendant shipowner Netumar was negligent and that its negligence was the proximate cause of the plaintiff's accident. This is conclusively demonstrated not only by the record in this case, but also by examining the evidence which the trial judge, in denying the shipowner's post-trial motions, held supported the verdict.

In support of its decision, the trial judge stated:

"William Montella, the carpenters' foreman, testified that Richard A. Piper, the port captain for the shipowner, told him exactly what to do in connection with the construction of the pipe bed including what nails and lumber to use. Moreover, he testified that he was not told how many pipes were to be stowed in the pipe bed beside the number 1 hatch or how much they weighed, nor was he shown the stowage plan. Mr. Piper testified in a portion of his deposition which was read to the jury that the pipe bed was constructed pursuant to oral instructions which he gave to Mr. Montella and also that as port captain he was responsible for the loading of the vessel in conjunction with the ship's officers." (459a).

Montella never testified that the port captain told him exactly what to do in connection with the construction of the pipe bed including what nails and lumber to use.

When he was asked specifically if Mr. Piper told him how to construct the beds, he responded "No" (235a-236a). On his examination before trial he testified that the construction of the pipe bed was his job and all that the port captain Piper told him was to build two pipe beds (169a).

At one point in the course of his testimony Montella did testify:

"Q. And Mr. Piper doesn't tell you what type of lumber to order, does he? A. Mr. Piper tells you every nail you take, every nail you take. Mr. Piper tells you what to bring in, what not to bring in, how much to spend and everything else. Let's get it straight.

"Q. He tells you what nails to use? A. Mr. Piper tells you everything, for the simple reason that after the ship is complete, they are always complaining about the bills." (236a)

When pressed further on cross-examination, Montella conceded that what he meant by his testimony was that Netumar's port captain was concerned that money was not wasted (240a). According to Montella, everybody knows that in making a pipe bed 4 x 6 lumber is used and he ordered the lumber which he [Montella] "knew was needed". Insofar as the nails were concerned, "He [Piper] didn't say whether a 10-penny nail or a 60-penny nail because they cost the same. So, if I ordered nails, whether it's a 10-penny nail or 60-penny nail, the case is the same." He concluded his explanation by saying (240a):

"So, you get the 4 x 6 timber and the 60 penny spikes and you do it. After the job is done, they say you spent a little too much money, always. *That is what I am saying. Insofar as him telling me what to build it with,*

he didn't tell me. He didn't have to." (Emphasis supplied) (239a-240a).

While Montella did testify that he was not told how many pipes were to be stowed in the pipe bed beside the No. 1 hatch or how much they weighed, and was not shown the cargo plan, it was his testimony that the way he made the bed it did not matter "what size pipe, diameter pipe or length of pipe" went into the bed and that the weight of the pipe was not necessary for the construction of the pipe bed (254a-255a).

Insofar as the stowage plan was concerned, Montella testified that it is used "sometimes" in connection with the marine carpentry work (233a). According to Montella it is not always possible for the port captain to tell what cargo he has because there are times when all cargo is not booked. The usual operation when a request for carpentry service is made, is for Montella to go to the pier and find out what the port captain wants performed. If the cargo is already on the pier or has arrived by lighter, the port captain tells him what he has and Montella can tell what the nature and quantity of cargo is by looking at it (234a-235a). In this instance, all of the pipe cargo to be loaded aboard the SS MOSQUEIRO had arrived at the pier before Montella was called in to construct the pipe beds (320a, 321a).

The trial court also was in error in interpreting port captain Piper's testimony that the pipe bed was constructed pursuant to oral instructions which he gave to Mr. Montella. All that the port captain said was that he issued an oral work order to Montella to construct the pipe beds (182a-183a). He made no claim nor did he even intimate that he instructed or intended to instruct the marine carpenters on how to construct the pipe bed (182a-186a).

As this Court pointed out in *Traupman v. American Dredging Company*, 470 F.2d 736, 738 (2 Cir. 1972), while

a jury is allowed to speculate on the connection between a defendant's admittedly negligent act, and the plaintiff's injury, it does not have the same latitude in determining whether the act complained of was negligently performed in the first instance. The trial court's determination, however, gives the jury the same latitude in finding negligence even though it is inconceivable how conduct which produces a reasonably fit pipe bed could be negligence. Not only must there be facts from which inference can be reasonably drawn, but as the United States Supreme Court noted in *Galloway v. United States*, 319 U.S. 372, 396 (1943), the facts from which the jury is allowed to make its inferences must have a reasonable tendency to sustain such inferences.

Admittedly, in *Atlantic & Gulf Stevedores v. Ellerman Lines*, 369 U.S. 355, 364, the United States Supreme Court has stated that where there is a view of the case that makes the jury's answers to special interrogatories consistent they must be resolved that way, nowhere has it been held that the consistency is to be achieved by a misinterpretation of the facts and a misapplication of the law. It is not the trial court's function to create a basis on which to sustain a jury's finding where none exists.

Even assuming that the evidence referred to by the Court could be interpreted to support a finding of shipowner participation in the construction of the pipe bed, such participation, the end result of which was the construction of a pipe bed which was reasonably fit for its intended purpose, could not be negligence under any accepted definition of the law.

Nor, as will be shown in Points III and IV of this brief, does the shipowner's exercise of overall supervision of the loading operations or the construction of the pipe bed, standing alone, establish negligence on the part of the shipowner.

POINT II

The jury's finding that defendant Netumar was negligent is irreconcilably inconsistent with its finding that the defendant's vessel was not unseaworthy and not supported by the evidence.

The finding by the jury that the vessel was not unseaworthy in the context of this case precludes any finding that the plaintiff's accident was proximately caused by any negligence on the part of the defendant shipowner.

The trial judge defined the plaintiff's claim under unseaworthiness as follows:

"He further contends that the SS MOSQUEIRO was unseaworthy in that it was not a safe place in which to work and in that the pipe bed structure and fence was not reasonably fit for the uses intended and was weak, inadequate, improperly designed and constructed; and that the method used for the stowage of cargo was not suited for safe operations." (408a)

Since under the definition of the claim as given to the jury, the shipowner also had a duty to furnish a safe place in which to work, it is inconceivable how the SS MOSQUEIRO could be a safe place in which to work under the warranty of seaworthiness but unsafe as the trial court found under the concept of negligence (460a). The doctrine of the warranty of seaworthiness, in essence, means that "things about the ship, whether the hull, the decks the machinery, the tools furnished, the stowage or the cargo containers, must be reasonably fit for the purpose for which they are to be used". *Gutierrez v. Waterman S.S. Corp.*, 373 U.S. 206, 213 (1963). The duty to furnish a safe place of work is only a duty of care, the breach of which results in liability for negligence, when the breach proximately causes injury to a foreseeable person. See *Earles v. Union Barge*

Lines Corp., 486 F.2d 1097, 1104 (3 Cir. 1973). Since the duties imposed on a shipowner by negligence concepts are far less onerous than those imposed under the warranty of seaworthiness, there is no possible way that the shipowner could be liable for negligence but not unseaworthiness under the facts of this case.

Since unseaworthiness also includes an unsafe manner of loading cargo *A.G. Stevedores v. Ellerman Lines*, 369 U.S. 355 (1962) and overloading or improper stowage, *Petition of Long*, 439 F.2d 109, 113 (2 Cir. 1971); *Ryan Stevedoring Co. v. Pan-Atlantic S.S. Corp.*, 350 U.S. 124 (1956), the jury's finding of no unseaworthiness precludes any finding of negligence arising from unsafe loading procedures, overloading or improper stowage. As the United States Supreme Court pointed out in *Usner v. Luckenbach Overseas Corp.*, 400 U.S. 494 (1971), unseaworthiness is a condition, and while a vessel's unseaworthiness might arise from the method or manner of loading or stowing the vessel's cargo, a ship is not rendered unseaworthy or its owner negligent by the isolated negligent act of a fellow longshoreman.

There is therefore no basis in law or in fact on which to sustain the jury's finding of negligence on the part of the shipowner Netumar. The jury finding must be vacated and set aside and the complaint dismissed. See *Spano v. N.V. Koninklijke Rotterdamsche Lloyd*, 472 F.2d 33 (2 Cir. 1973); *Turner v. "The Cabins" Tanker Inc.*, 327 F. Supp. 515 (D.C. Del., 1971); *Poller v. Thorden*, 336 F. Supp. 1231 (E.D. Pa. 1970).

POINT III

The trial court was in error in refusing to charge that the defendant Netumar did not have the duty to supervise an independent contractor in the conduct of its work and was not liable for injuries resulting from their negligence in conducting their work.

The law is well settled that the shipowner is not responsible for the negligence of longshoremen unless such negligence creates an unseaworthy condition. *Spano v. Koninklijke Rotterdamsche Lloyd*, 472 F.2d 33, 35 (2 Cir. 1973). It is also well settled that the shipowner does not have the duty to actively supervise the work of longshoremen or the employees of other shoreside contractors to see that their work is done in a safe manner. *Filipek v. Moore-McCormack Lines*, 258 F.2d 734, 737 (2 Cir. 1958), cert. den. 359 U.S. 927 (1959); *Albanese v. N.V. Nedrl.*, 346 F.2d 481, 483 (2 Cir. 1965), rev. on other grounds 382 U.S. 283 (1965).

Even though the shipowner may exercise overall control over the loading operation, it is not responsible for the instrumentalities adopted or methods used in the absence of some showing that the shipowner directed the use of negligent methods, expressly approved them, or consented to their use. *Cornec v. Baltimore & O. R. Co.*, 48 F.2d 497, 502 (4 Cir. 1931).

The defendant shipowner requested the trial judge to charge the jury as follows:

“10. A shipowner who hires a qualified shoreside contractor has no duty to actively supervise its work to see that it is done in a safe manner.

“14. That the shipowner as the employer of NEW JERSEY EXPORT and I.T.O. is not liable for injuries which resulted from their negligence in conducting their work. The defendant shipowner had no duty to

supervise the work of either NEW JERSEY EXPORT or I.T.O. to see that it was done in a safe manner.

"19. The officers aboard defendant's vessel had no duty or right to supervise the method used or adopted either by NEW JERSEY EXPORT or I.T.O. in the conduct of their work."

The trial judge refused so to charge (395a) and the shipowner excepted to the Court's refusal (451a-452a).

Aside from the fact that the jury's finding of no unseaworthiness was inconsistent with and would preclude a finding of negligence based on negligent methods used or instrumentalities adopted, there was no evidence that any unsafe methods or instrumentalities were used or adopted. Mere proof that an accident occurred is not evidence of anyone's negligence. *Traupman v. American Dredging Company*, 470 F.2d 736, 738 (2 Cir. 1972). See also *Mosley v. Cia Mar Adra, S.A.*, 314 F.2d 223, 228-229 (2 Cir. 1963), *In re Marine Sulphur Queen*, 460 F.2d 89, 99 (2 Cir. 1972).

Nor does overall control over the operations in order to insure that the work is satisfactorily completed, make the shipowner responsible for the negligence of the stevedore or marine carpenters in the performance of their work, as the trial court held in denying Netumar's post-trial motions. It said:

"Despite the incidental delegation of certain functions to others, in this case the carpenters and the third-party defendant, the shipowner remained responsible for performing the overall operation with reasonable care. Its failure to perform the overall operation with reasonable care created an unsafe condition and properly resulted in the jury's finding of liability." (460a)

As this Court said in *Gallagher v. United States Lines Co.*, 206 F.2d 177, 179 (2 Cir. 1953) cert. den. 346 U.S. 897

(1953), "a general ability to control the work in order to insure that it is satisfactorily completed in accordance with the requirement of the contract does not of itself make the hirer of an independent contractor liable for harm resulting from negligence in conducting the details of the work."

Since there was no evidence of any unsafe conduct in the stevedoring operations except the opinion of the marine carpentry foreman that at some unknown time a pipe was permitted to come into contact with and damaged the upright, there was no evidence to support a finding of either actual or constructive notice *Rice v. Atlantic Gulf & Pacific Co.*, 484 F.2d 1318 (2 Cir. 1973), or negligence on the basis of a single isolated negligent act of plaintiff's fellow longshoremen *Usner v. Luckenbach Overseas Corp.*, 400 U.S. 494 (1971).

POINT IV

The trial court was in error in refusing to charge the jury that a shipowner's conduct does not defeat the right to indemnity unless it actively hinders or prevents the stevedore from doing a workmanlike job and charging that jury that a shipowner's inaction could defeat indemnity.

In charging the jury on conduct which would preclude the defendant shipowner from recovering indemnity, the trial court charged the jury that the shipowner would be entitled to indemnity "unless by some action or *inaction*" it prevented, hindered or seriously handicapped the stevedore in performing its workmanlike job or fulfilling its obligations. (Emphasis Supplied) (443).

The defendant shipowner had requested the trial court to charge that:

"25. That the shipowner's conduct cannot defeat the right to indemnity unless it is of such a nature

that it actively hinders or prevents either NEW JERSEY EXPORT or I.T.O. from doing a workmanlike job."

The Court refused however so to charge (395a) and the defendant shipowner excepted to the Court's refusal to charge as requested (451a).

In *Ryan Stevedoring Co. v. Pan Atlantic Corp.*, 350 U.S. 124, 134-135 (1956), the United States Supreme Court was quite explicit that inaction was not conduct which would preclude indemnity. In rejecting the stevedore's contention that the shipowner was barred from recovering indemnity because it failed to discover and reject the stevedore's unsafe stowage of cargo, the Supreme Court said:

"* * *, as between themselves, the contractor, as the warrantor of its own service, cannot use the shipowner's failure to discover and correct the contractor's own breach of warranty as a defense."

In *Weyerhaeuser S.S. Co. v. Nacirema Operating Co., Inc.*, 355 U.S. 563, 569 (1958), the Supreme Court reiterated this position when it held that in the area of contractual indemnity theories of active or passive as well as primary and secondary negligence were inappropriate.

While the Supreme Court did not further delineate what other conduct would preclude recovery, this Court has held that it must in some way "actively" hinder or prevent the stevedore in its ability to do a workmanlike job. *Misurella v. Isthmian Lines*, 328 F.2d 40, 41-42 (2 Cir. 1964); *Mortensen v. A/S Guttre*, 348 F.2d 383 (2 Cir. 1965); *Albanese v. N.V. Nederl.*, 392 F.2d 763, 765 (1968) rev. on other grounds 393 U.S. 74 (1968).

The trial court's charge that the shipowner could forfeit its right to indemnity by inaction was incorrect as a matter of law, and the jury's finding that the shipowner's

conduct precluded indemnity must therefore be vacated and set aside and judgment entered granting indemnity to the shipowner against I.T.O.

POINT V

The record is devoid of any evidence to support the jury's finding that the shipowner's conduct precluded indemnity.

There is no evidence in the record of any conduct on the part of the shipowner which prevented or seriously handicapped the stevedore and its ability to do a workmanlike job. There was no testimony that any agent of the shipowner in any way interfered with the manner in which the longshoremen were conducting the loading operation, or that any directions were given by anyone for whom the shipowner could be responsible as to how or where to stow the cargo. According to Ratliff, the hatch boss, his function was to see that the cargo was put on the ship in the place where he was told to put it by the stevedore (81a). It was also undisputed that the Master, Chief Officer of the SS MOSQUEIRO, and Netumar's Port Captain participated only in the general loading operation and that while they made up and approved the proposed stowage, it was subject to approval by the stevedore I.T.O. (173a). Since the record is devoid of any proof that the shipowner actively prevented or hindered the stevedore in the conduct of its work, and the only view which is consistent with the jury's finding that I.T.O. breached its warranty of workmanlike service is that the longshoremen damaged the upright, there is no evidence to support the jury's finding that the shipowner's conduct precluded indemnity.

Any suggestion that the jury could have found that the shipowner interfered with or prevented the stevedore from performing its service in a workmanlike manner is unwarranted and finds no support in the evidence.

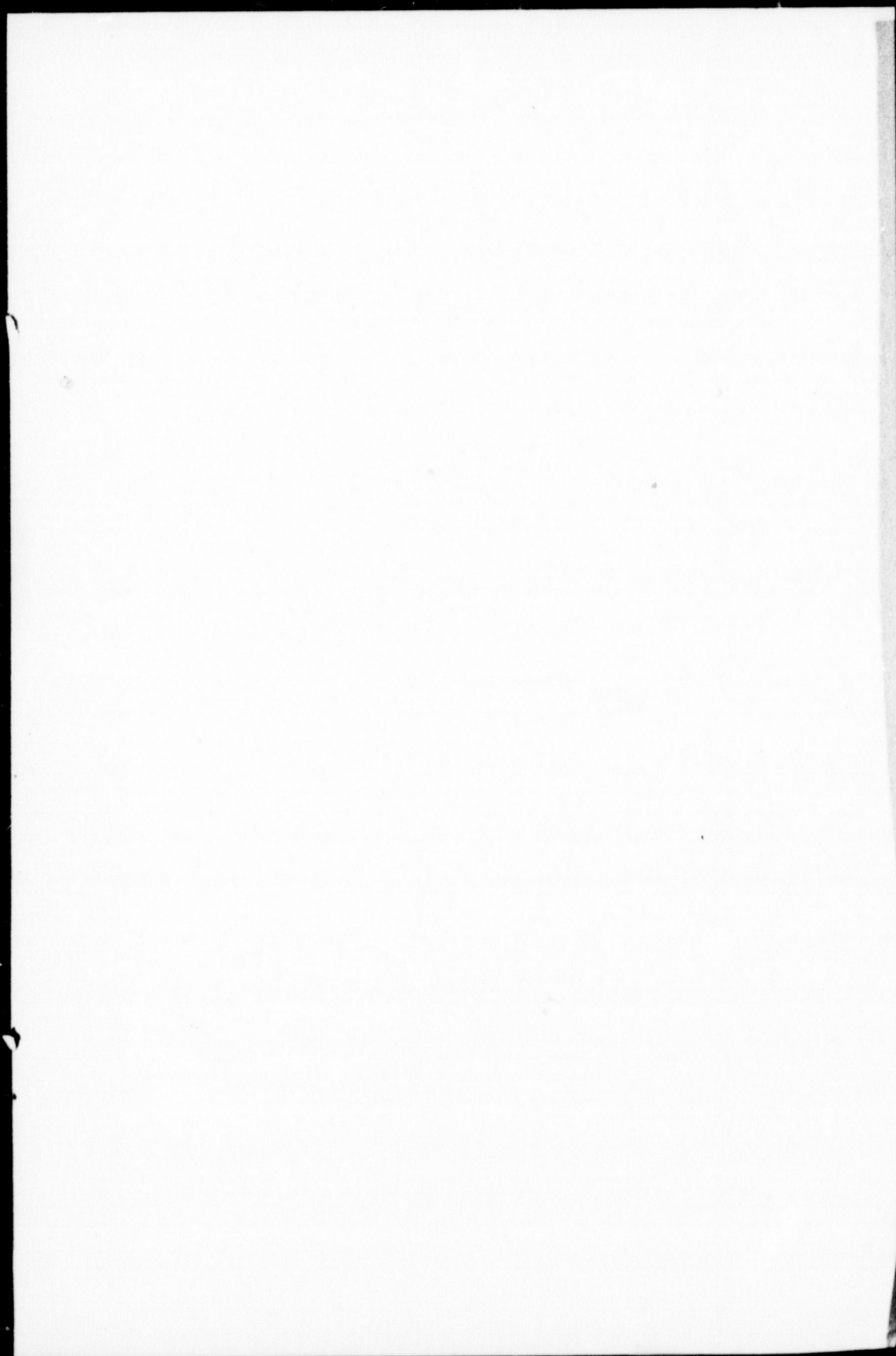
When an attempt was made to obtain an opinion from Montella as to whether the pipe bed in question would hold the pipe if it was loaded above the height of the up-rights, it was objected to and sustained on the grounds that there was no such testimony in the case:

"Q. If the pipe is loaded above the 5-foot area, will it hold the pipe?

Mr. Testa: Objection, Your Honor. There is no such testimony in this case.

The Court: That is correct, there is none" (257a).

The fact that Montella was permitted to testify that when he came upon the scene the pipe was much higher than the up-rights (258a), does not support an inference that the pipe bed was overloaded and that the shipowner had directed the overloading. In the first instance, the stowage of the pipe was subject to approval by the stevedore (173a). Secondly, it was Montella's testimony that the way he constructed the pipe bed, it was never not strong enough and would hold anything (254a-255a). Thirdly, Montella also testified that when he got there after learning of the plaintiff's accident, the pipes were okay (251a). Finally, when Montella arrived at the scene of the accident, the plaintiff's foot had been freed and he was sitting on deck at the forward end of the No. 2 hatch (232a). According to the plaintiff and his witnesses, it was necessary to move the pipe in order to free plaintiff's left foot (32a, 79a-80a, 141a). Since the plaintiff and his witnesses were in complete agreement that when the accident occurred none of the pipe had been stowed above the up-rights (108a-109a, 119a, 136a, 143a-144a), that it had to be moved to release the plaintiff's foot, and there was no testimony to the contrary or that the conditions which Montella described existed at the time of plaintiff's accident, no inference of overloading could be drawn from Montella's testimony. Actually, Montella never testified that there was an overloading or that the bed was not sufficient to hold pipe loaded above the up-rights (257a-258a).



Conclusion

The judgment in favor of the plaintiff against defendant Netumar should be reversed and set aside and judgment entered dismissing the complaint. In the alternative, if the judgment in the plaintiff's favor is not reversed and set aside, the judgment insofar as it dismisses the third-party action for indemnity against International Terminal Operating Co., Inc. should be vacated and set aside and judgment entered in favor of defendant Netumar against International Terminal Operating Co., Inc. for all sums awarded against Netumar in favor of the plaintiff, together with the costs and expenses of the trial below and the appeal herein insofar as they pertain to the defense of the action by the plaintiff. Further in the alternative the judgment below should be reversed and set aside and a new trial granted as to all the parties and issues.

Respectfully submitted,

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Of Counsel

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

JOAQUIM CONCEICAO,
Plaintiff-Appellee,
against
NEW JERSEY EXPORT MARINE CARPENTERS,
INC.
Defendant and Third-Party
Plaintiff-Appellee,
and
CIA DE NAV. MAR. NETUMAR,
Defendant and Third-Party
Plaintiff-Appellant,
against
INTERNATIONAL TERMINAL OPERATING CO.,
INC., Third-Party Defendant-
Appellee.

State of New York,
County of New York,
City of New York—ss.:

DAVID F. WILSON, being duly sworn, deposes
and says that he is over the age of 18 years. That on the 23rd
day of May, 1974, he served two copies of
Appellant's Brief on
See attached list, the attorney s
for See attached list
by delivering to and leaving same with a proper person in charge of
their office at See attached list
in the Borough of Manhattan, City of New York, between
the usual business hours of said day.

David F. Wilson

Sworn to before me this

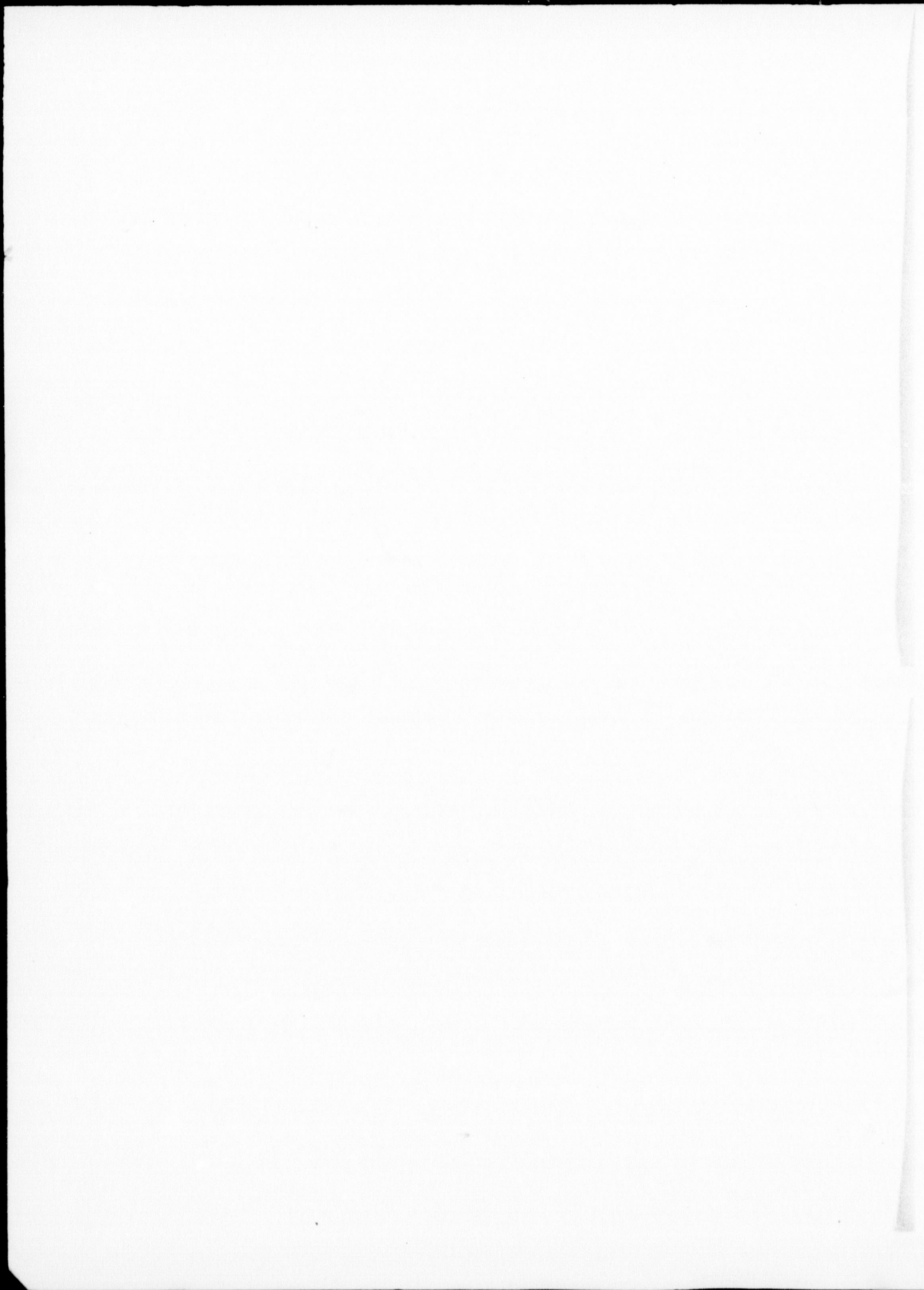
23rd day of May, 1974.

Courtney Brown

COURTNEY BROWN
Notary Public, State of New York
No. 31-547220
Qualified in New York County
Commission Expires March 30, 1976

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the attorneys for the Plaintiff-Appellee
by depositing the same, properly enclosed in a securely sealed
post-paid wrapper, in a Branch Post Office regularly maintained
by the Government of the United States at 90 Church Street, Borough
of Manhattan, City of New York, directed to said attorneys at
No. 1 Newark Street, Hoboken, N. J. 07030 (xxxx)xxxx,
that being the address designated by them for that purpose upon
the preceding papers in this action.

David F. Wilson

Sworn to before me this

23rd day of May, 1974.

Courteney J. Brown

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